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No. 389

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

CONTINENTAL NUT COMPANY,
Petitioner,

VS.

ROBERT L. BERNER COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No. _____

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CONTINENTAL NUT COMPANY,
Petitioner,

vs.

ROBERT L. BERNER COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Continental Nut Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled cause on April 10, 1968. That judgment affirmed a judgment notwithstanding the verdict entered in favor of respondent and against petitioner on the ground that under Illinois law the facts proved were insufficient to sustain the verdict of the jury.

CITATIONS TO OPINIONS BELOW

The District Court rendered a Memorandum Opinion on March 3, 1967, denying respondent's motion for judgment notwithstanding the verdict while granting its motion for a new trial. This opinion is unpublished and is attached hereto as Appendix B. On March 31, 1967, the District Court entered an order vacating the previous order of March 3, 1967, and granting respondent's motion for judg-

ment notwithstanding the verdict. The March 31 order also granted conditionally respondent's motion for a new trial. This order is attached hereto as Appendix C. The opinion of the Court of Appeals for the Seventh Circuit affirming the District Court's judgment is reported at 393 F.2d 283 and is attached hereto as Appendix A. An earlier opinion of the Court of Appeals for the Seventh Circuit in this cause is reported at 345 F.2d 395.

JURISDICTION

The opinion of the Court of Appeals for the Seventh Circuit was rendered April 10, 1968. Petitioner filed a timely petition for rehearing, which was denied May 17, 1968. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioner's action for compensatory and punitive damages was based upon the circulation of a libelous publication by one of its business competitors, and was tried before a jury in the United States District Court for the Northern District of Illinois. The jurisdiction of the district court rested upon diversity of citizenship. After hearing the the evidence, the jury returned a verdict in petitioner's favor in the amount of $424,000—$212,000 as compensatory damages and $212,000 as punitive damages. However, the trial judge entered a judgment notwithstanding the verdict in favor of respondent, and the Court of Appeals upheld this judgment on the ground that the evidence submitted by petitioner was legally insufficient under Illinois law. The question presented is:

Whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision invoked by this petition is the Seventh Amendment to the United States Constitution, U.S. Const. Amend. VII:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

This is an appeal from a decision of the United States Court of Appeals for the Seventh Circuit affirming a judgment of the trial court which granted judgment for the respondent notwithstanding a jury verdict in favor of petitioner in the amount of $424,000. The case was tried in the federal courts under 28 U.S.C. § 1332, by virtue of a diversity of citizenship among the parties.

Petitioner Continental Nut Company and respondent Robert L. Berner Company are competitors in the importation of Brazil nuts (A. 40).* As of 1961, each company had participated in the nut business for about twenty-five years (A. 302, 643), respondent importing Brazil nuts since 1945 (A. 643) and petitioner since the early 1950's (A. 303). Although the two competitors were closely matched, petitioner's business had been improving (P. Exs. 21-24; A. 324, 927-996) while respondent's had been falling off (R. Exs. 15-18; A. 249, 904-922). As the beginning of the 1961 selling season approached, Robert L. Berner, president of respondent, found that his company's competitive position had been undermined by a drastic drop in the price of

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* References to A. ..... are to the Appendix to Brief for Plaintiff-Appellant in the Court of Appeals.

dried Brazil nuts from an average of 21 cents per pound, which respondent had paid for its inventory (A. 167-8), to 13 cents or 14 cents per pound (A. 170, 178, 559). Petitioner, however, dried its own nuts and had purchased its inventory of natural nuts at prices from 9 cents to 15 cents per pound (A. 343-5, 495) and was, therefore, in a superior competitive position.

Faced with this dilemma, Berner pursued a course designed to neutralize or eliminate the competitive advantage of petitioner, thereby enabling respondent to sell its high-priced inventory. He composed the libelous bulletin upon which this suit is based attacking petitioner's business ethics and the natural Brazil nuts in its inventory. The bulletin (P. Ex. 2; A. 140, 813-814) on the letterhead of respondent, was dated September 25, 1961 (the beginning of the 1961 selling season) and was sent to about 60 nut brokers "from Denver east" (A. 183, 647), with the admitted intention that the information be passed on to prospective customers (A. 181-2). The libelous character of the bulletin is established and is not in issue in this petition.

In the bulletin (A. 813-814), Berner referred to the natural Brazil nuts imported by petitioner as "Green", an unfamiliar term little used in the trade. He stated that such nuts "are rarely, if ever, properly cured," and that when they had been imported some years before, most customers who bought them were unaware that they were getting "Green" nuts, and "ran into trouble." He went on to say very few "Green" nuts had been imported during the past few years and that the trade had more or less forgotten about them, "so this year some of the importers (undoubtedly to gain a price advantage) have gotten back into the Green business." Petitioner however, far from getting back into the "Green" business, had imported natural nuts

since 1950 (A. 307), and had always carefully cured and dried these nuts before sale (A. 304-319).

The bulletin went on to cast totally unwarranted aspersions upon natural Brazil nuts, charging that they are overly moist and that they shrink and develop mould. "This means that the people who buy Green Brazil Nuts (and most of them won't know they are getting green nuts) will have a shrinkage on their hands and the nuts will develop mould" (A. 814). It was further stated that the Food and Drug Administration would be especially active, and if they "pick up Green Brazils" which do not crack 90%, as Berner claimed the natural nuts were not likely to do, "somebody is going to be in trouble." These dire consequences were also predicted if natural Brazils were used in mixed nut packages. At the end of the bulletin the Continental Nut Company was listed first among four companies which were reputedly the main importers of "Green" Brazil Nuts. Three of the four named companies were competitors of respondent (P. Ex. 5C; A. 163, 819).

The evidence made clear the complete falsity of the bulletin. Petitioner's president, Gerald Stiefvater, testified in detail regarding the careful process of curing and drying to which natural nuts are subjected: they are aerated aboard ship while on route to the United States (A. 308); petitioner and the Food and Drug Administration inspect them upon arrival (A. 309); imperfect nuts are rejected (A. 309) on the basis of petitioner's contracts with sellers requiring that the nuts pass inspection (petitioner's standard is higher than that set by the Food and Drug Administration) (A. 304); the nuts are transported to petitioner's plant where they are sized, crack tested and tested for moisture (A. 315-316); the moisture level is reduced by turning the nuts from bin to bin (A. 317); and, finally, nuts

lighter than the average are removed by suction (A. 318). There is a final inspection by petitioner and by the U.S. Department of Agriculture (A. 319). Mr. Stiefvater further testified that he had never heard a customer say he did not know what kind of nuts he was purchasing (A. 333). There was testimony from several individuals indicating that the distinction between natural and dried nuts was well known, but that the term "Green" nuts was not used (A. 155, 564). Louis E. Nordlinger, a witness for respondent, whose firm imports 50% of all Brazil nuts into the United States (A. 556), testified on cross examination that he never used the word "Green" to describe Brazil nuts (A. 564), and that natural nuts can be properly dried and are then no more susceptible to mould than dried Brazil nuts (A. 563, 564).

The clear import of the bulletin was to make petitioner appear as a shady operator and to leave the impression that any customer dealing with petitioner risked shrinkage, mould and trouble with the Food and Drug Administration. Petitioner called as an expert witness John F. Wright, a professor of marketing at the University of Illinois, who testified that in his opinion the bulletin "would cause customers to leave the doing of business with one of the mentioned companies in the letter" (A. 519). As reasons for this tendency, he listed fear of loss of customers, fear of loss of good will, fear of deteriorating relationship with customers, fear of lawsuits, fear of financial loss, fear of seizure by the Food and Drug Administration, fear of litigation and involvement with the Food and Drug Administration, fear of purchasing agent losing his job (A. 520-1). That respondent succeeded in this endeavor was clearly demonstrated by the evidence which petitioner introduced at trial.

Widespread publication of the libel was proved not only

by the admitted circulation of respondent's bulletin to sixty brokers (A. 183), but also by testimony of four of petitioner's brokers who saw copies of the bulletin in their territories across the country. One broker testified that he saw a copy of the bulletin in eastern Michigan (A. 254-6) and that his sales there dropped off (A. 257, 259-260). Another saw a photograph of it in Arkansas (A. 277) and lost so many customers he resigned as petitioner's broker for Arkansas (A. 281). A Minneapolis broker testified he had seen a copy in St. Paul (A. 290). The broker for southern Alabama, northwest Florida and southwest Georgia testified he saw the bulletin in several places in his territory (A. 498, 503) and had been told by a buyer for 50 to 75 retail stores that, "you got some old rotten nuts" (A. 502). His sales dropped drastically (A. 502-503).

Petitioner introduced abundant evidence showing that the result of the publication of the bulletin and its widespread circulation was to divert a substantial amount of its business to respondent. The immediate result of the libel was that petitioner was unable to sell a substantial portion of its inventory of Brazil nuts (A. 474-79). The extent of this harm was also shown. A certified public accountant testified that petitioner had been left with unsold Brazil nuts in the period following the libel which, if sold, would have produced net profits of $254,064 for 1962 (A. 479) and of $179,261 for 1963 (A. 479-82).

Petitioner also showed a drastic decline in its profits as compared with previous years after the circulation of the libel:

Year ended June 30	Net Operating Profit	Reference
1961	178,093	P. Ex. 22; A. 324, 951
1962	17,825	P. Ex. 23; A. 324, 968
1963	62,140	P. Ex. 24; A. 324, 986

Further proof that petitioner's business declined immediately following the libel was presented in the form of data showing the loss of a substantial number of petitioner's customers. Of the 384 customers which petitioner had in 1960, there was a loss of 92 customers, or 23.9%, in 1961, the year the libel was published; 51 more were lost in 1962 or 13.2%; for the two years a total of 143 customers or 37% of the 1960 total were lost (A. 700-701).

The effect of the libel upon petitioner was also shown by contrasting petitioner's sales results with those of respondent. During the several years preceding the publication of respondent's bulletin, petitioner's business had been increasing while respondent's business had been declining. Yet in 1962, the year following the libel, petitioner's sales dropped $596,097 while those of respondent rose $1,696,301. A summary of the audit reports presented by certified public accountants shows the following:

CONTINENTAL NUT COMPANY—SALES AND PROFITS

Year Ended June 30	Net Sales	Gross Profits	Earned Surplus	Reference
1959..	$4,075,005.00	$581,662.00	$315,666.29	P. Ex. 21; A. 324, 934, 936
1960..	5,358,057.61	890,388.10	374,447.99	P. Ex. 21; A. 324, 936, 938
1961..	6,684,232.94	825,364.70	395,418.96	P. Ex. 22; A. 324, 955, 959
1962..	6,088,135.94	719,325.29	298,527.92	P. Ex. 23; A. 324, 971, 972
1963..	6,852,614.97	878,394.86	167,152.97	P. Ex. 24; A. 324, 990, 991

ROBERT L. BERNER COMPANY—SALES AND PROFITS

Year Ended Sept. 30	Net Sales	Gross Profits	Earned Surplus	Reference
1960..	$7,962,954.02	$716,331.98	$370,632.02	P. Ex. 15; A. 249, 907
1961..	7,538,172.95	704,467.65	382,276.08	P. Ex. 16; A. 249, 912
1962..	9,234,474.43	856,805.04	399,981.54	P. Ex. 17; A. 249, 917
1963..	8,765,969.82	820,544.45	423,585.08	P. Ex. 18; A. 249, 922

The jury returned a verdict of $212,000 compensatory damages, which was well within the loss of business proven by petitioner, and $212,000 punitive damages. The district judge, however, entered judgment notwithstanding the verdict for respondent, and this judgment was affirmed by the

Court of Appeals for the Seventh Circuit. The Court of Appeals held that to prove special damages in a libel action from lost profits, Illinois law requires that a plaintiff must prove the amount of business lost from each known former customer and show that the customer withdrew because of the libel (App. A. p. 22).

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision to determine under Illinois law rather than federal law the question of the sufficiency of the evidence to sustain the verdict of the jury raises an important question, which should be but has not been settled by this Court. The question involves the application of the principle stated by this Court in *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525 (1958).

In the *Byrd* case, a state rule allocated to the trial judge the decision whether an electric company was the statutory employer of an injured lineman, a status which would give the company immunity from the lineman's negligence action under the state workman's compensation act. In holding that the rule was not carried over to the federal legal system, this Court stated (356 U.S. at 537-538):

> "The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. *Jacob* v. *New York*, 315 U.S. 752. The policy of uniform enforcement of state-created rights and obligations, see, e.g. *Guaranty Trust Co.* v. *York*, supra, cannot in every case exact compliance with a state rule—not bound up with the rights

> and obligations—which disrupts the federal system of allocating functions between judge and jury. *Herron* v. *Southern Pacific R. Co.*, 238 U.S. 91."

The principle announced in the *Byrd* case has been followed in other factual situations. In *Simler* v. *Conner*, 372 U.S. 221 (1963), for example, this court held that in a diversity action in a federal district court, federal law governs in determining whether an action is "legal" with the concomittant right to trial by jury, saying (372 U.S. at 222):

> "We agree with respondent that the right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions. The federal policy favoring jury trials is of historic and continuing strength. *Parsons* v. *Bedford*, 3 Pet. 433, 446-449; *Scott* v. *Neely*, 140 U.S. 106; *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 537-539; *Beacon Theatres, Inc.*, v. *Westover*, 359 U.S. 500; *Dairy Queen, Inc.*, v. *Wood*, 369 U.S. 469. Only through a holding that the jury-trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved."

The essential question posed by this case is whether this principle, which requires that the right to trial by jury in a federal court be determined under federal law, also requires that the question of the sufficiency of the evidence to sustain the verdict of the jury in a federal court be determined under federal law. This Court has itself on two occasions in recent years indicated that this is an important question yet to be decided under the principle of the *Byrd* case.

In *Dick* v. *New York Life Insurance Co.*, 359 U.S. 437 (1959), the Court reversed a decision in which the verdict

of the jury had been upset under state law, saying (359 U.S. at 444-445):

> "Lurking in this case is the question whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship. On this question, the lower courts are not in agreement. Compare *Rowe* v. *Pennsylvania Greyhound Lines*, 231 F.2d 922; *Cooper* v. *Brown*, 126 F.2d 874; *Lovas* v. *General Motors Corp.*, 212 F.2d 805, with *Davis Frozen Foods* v. *Norfolk Southern R. Co.*, 204 F.2d 839; *Reuter* v. *Eastern Air Lines*, 226 F.2d 443; *Diederich* v. *American News Co.*, 128 F.2d 144. And see Morgan, Choice of Law Governing Proof, 58 Harv. L. Rev. 153, 174, and 5 Moore's Federal Practice (2d ed. 1951) § 38.10. But the question is not properly here for decision because, in the briefs and arguments in this Court, both parties assumed that the North Dakota standard applied. Moreover, although the Court of Appeals appears to have applied the state standard, that court did not discuss the issue. Under these circumstances, we will not reach out to decide this important question particularly where, in the context of this case, the two standards are substantially the same. A decision as to which standard should be applied can well be left to another case where the question is briefed and argued."

Subsequently, the Court granted certiorari in *Mercer* v. *Theriot*, 377 U.S. 152 (1964) apparently to decide this question, but, as in the *Dick* case, the Court again found it unnecessary to decide whether a state or federal standard should be applied because "The evidence was sufficient under any standard which might be appropriate—state or federal. See *Dick* v. *New York Life Insurance Co.*, 359 U.S. 437, 444-445." 377 U.S. at 156.

In *Dick*, this Court recognized that there is a conflict

among the Courts of Appeals on this question (359 U.S. at 444-45). This conflict still exists, and, indeed, has become even more pronounced since the *Dick* case. The present case in which the Court of Appeals for the Seventh Circuit chose to apply a state standard, aligns that court with the Sixth Circuit, which had already held in *Lovas* v. *General Motors Corp,* 212 F.2d 805, 807 (6th Cir. 1954) that sufficiency of the evidence is a matter of state law thereby affirming a directed verdict for defendant in an action for wrongful death, and with the Second Circuit, which had held in *Rowe* v. *Pennsylvania Greyhound Lines,* 231 F.2d 922, 924 (2d Cir. 1956), cert. denied 351 U.S. 984 (1956), that it must look to state law for the rule determining the sufficiency of the evidence.

However, in *Gebhardt* v. *Wilson Freight Forwarding Co.,* 348 F.2d 129, 133 (3rd Cir. 1965) the Third Circuit held after *Dick* that in a diversity action where it is contended on appeal that the verdict is contrary to the weight of the evidence and that a denial of a motion for a new trial was erroneous, those issues are to be decided under federal law. The Third Circuit thus joined the Tenth Circuit, which had held in *Diederich* v. *American News Co.,* 128 F.2d 144, 146 (10th Cir. 1942), that the right of federal judges to pass on questions of law is as much an essential part of the process of jury trial guaranteed by the Constitution as the power of the jury to try facts; the Fourth Circuit, which had held in *Davis Frozen Foods, Inc.* v. *Norfolk & So. R. Co.,* 204 F.2d 839, 842 (4th Cir. 1953), that the question of the sufficiency of the evidence is "one of federal and not of state practice" (see also *Pinehurst, Inc.* v. *Schlamowitz,* 351 F.2d 509, 513 n. 7 (4th Cir. 1965)); and the Fifth Circuit, which in a well-reasoned line of decisions both before and after *Dick* has held that the evidentiary standard for submission of an issue to the jury in the federal courts is a matter of

federal not state law. *Reuter* v. *Eastern Airlines, Inc.*, 226 F.2d 443, 445 (5th Cir. 1955); *Shirey* v. *Louisville & Nashville R. Co.*, 327 F.2d 549, 552 (5th Cir. 1964); *Planters Manufacturing Co.* v. *Protection Mutual Insurance Co.*, 380 F.2d 869, 871 (5th Cir. 1967), cert. den. 389 U.S. 930 (1967).

The question adverted to but not decided in the *Dick* and *Mercer* cases and as to which the Courts of Appeals are in conflict is squarely presented by this case. The sufficiency of petitioner's evidence to sustain the jury's verdict under federal law is clear under the decisions of this Court in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946) and *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931). Each of those cases makes it clear that where the party suffering a wrong presents evidence of declines in gross receipts and profits following that wrong, it is up to the jury to determine whether and to what extent the party inflicting the wrong is liable in damages. As this Court said in *Bigelow* (327 U.S. at 266): "The comparison of petitioners' receipts before and after respondents' unlawful action impinged on petitioners' business afforded a sufficient basis for the jury's computation of the damage. . . ." The Courts of Appeals have consistently followed this principle in actions based upon federal law. See *Florists' Nationwide Telephone Delivery Network-America's Phone-Order Florists, Inc.* v. *Florists' Telegraph Delivery Association*, 371 F.2d 263, 267, 270 (7th Cir. 1967), cert. denied, 387 U.S. 909 (1967); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 346 F.2d 661, 666 (6th Cir. 1965), cert. denied, 382 U.S. 904 (1965); *Haverhill Gazette Co.* v. *Union Leader Corp.*, 333 F.2d 798, 806 (1st Cir. 1964), cert. denied, 379 U.S. 931 (1964); *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, 269 F.2d 950, 958-959 (10th Cir. 1959), cert. denied, 363 U.S. 843 (1960); *Merritt*,

Chapman & Scott Corp. v. *Guy F. Atkinson Co.*, 295 F.2d 14, 17-18 (9th Cir. 1961); *Flexitized, Inc.* v. *National Flexitized Corp.*, 335 F.2d 774, 779 (2d Cir. 1964), cert. denied, 380 U.S. 913 (1965).

In holding that petitioner's evidence was insufficient to sustain the jury's verdict, the Court of Appeals did not suggest that the evidence did not meet the federal standard laid down in these cases. Instead, it based its holding squarely and expressly upon its understanding of the requirements of Illinois law. Thus, the court stated: "The main contested issue presented by plaintiff's appeal is whether plaintiff made such proof of special damages *as is required under Illinois law* to sustain a verdict for actual damages and punitive damages in a libel *per quod* action" (Appendix A, p. 18) (emphasis supplied). The Court acknowledged that there were no Illinois cases squarely on point but concluded that the general trend of such cases indicated an Illinois rule requiring the party claiming damages from loss of business to produce specific testimony from customers claimed to have been lost. Since petitioner had not presented such testimony, the Court of Appeals concluded that Illinois law precluded recovery here notwithstanding the verdict of the jury.

The Court of Appeals chose simply to ignore the fact that petitioner also alleged damage from the loss of future customers, even though the district court originally held that allegation sufficient to require denial of the motion for an interlocutory appeal. Thus, in the March 3rd opinion, the district court held (App. B, p. 31):

> "While the verdict is unsupported as to sales lost from customers on the list maintained by plaintiff, the problem does not extend to all possible damages in this case. The amended complaint states that:

> 'said publications caused many of plaintiff's customers to withdraw their custom, resulting in the above decrease in gross income, and the publications caused many potential customers to withhold their custom.'
>
> Even though failure to prove by direct testimony the damages caused by loss of former customers' business is inexcusable, the same failure with respect to unknown customers not on the customer list is understandable. This is precisely the problem to which the exception to the strict proof rule is directed. Plaintiff could not know of unnamed merchants who had never bought its nuts and, because of the libel, chose not to."

However, in its March 31st order the court contradicted its earlier reasoning and granted the motion for judgment notwithstanding the verdict, saying (App. C, p. 33):

> ". . . there is no evidence in the record which would support a recovery in a reasonably ascertainable amount for the loss of potential customers or show that plaintiff's business was of the kind which had potential customers of whose existence it could not know."

In upholding this decision of the district court, the Court of Appeals necessarily adopted this view that Illinois law requires a damage showing of such precision and certainty that petitioner could not possibly satisfy it.

Petitioner submits that the holding in this case demonstrates that the sufficiency of the evidence in a diversity case should be determined under federal, not state, law. The Illinois rule applied by the Court of Appeals here imposes a standard of proof which is neither reasonable nor logically sound. It would force a party suffering from a false attack upon his business to convince customers who were lost as a result of that attack to testify, in effect, that they were taken in by defendant's story. It is unreasonable to expect

that such testimony will ever be available. Moreover, the Illinois rule simply ignores the fact that a substantial part of a decline in business in such a situation is always going to be attributable to the effect of the libel in preventing the victim from obtaining new customers. There is no conceivable way in which petitioner could have produced testimony from potential future customers who were deterred by respondent's false bulletin. Yet the effect of the Court of Appeals decision is to deprive petitioner of any recovery for the wrong which it suffered in the absence of specific testimony from customers.

In the final analysis, the unsoundness of the Court of Appeals' decision in this case is established by the jury's verdict. After hearing all the evidence, the jury concluded that petitioner had been damaged substantially by defendant's bulletin. As this Court stated in *Jacob* v. *New York*, 315 U.S. 752, 752-753 (1942):

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

CONCLUSION

For the foregoing reasons, a petition for writ of certiorari should be granted in this case.

Respectfully submitted,

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1967—JANUARY SESSION, 1968

No. 16268
CONTINENTAL NUT COMPANY,
Plaintiff-Appellant,
v.
ROBERT L. BERNER COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

April 10, 1968

Before HASTINGS, *Chief Judge,* and CASTLE and SWYGERT, *Circuit Judges.*

CASTLE, *Circuit Judge.* In *Continental Nut Company* v. *Robert L. Berner Company,* 7 Cir., 345 F. 2d 395, this Court held that the plaintiff's (Continental's) complaint against Robert L. Berner Company and certain other defendants stated a cause of action in libel. We there held that the statements in the alleged publication, though not of a character which would constitute a libel *per se,* are of the type which may constitute a libel *per quod,* and that Continental sufficiently alleged special damages so that its complaint was not vulnerable on that score. We reversed the District Court's dismissal of the complaint as to Robert L. Berner Company and certain of the other named defendants. The case was subsequently tried to a jury which returned a verdict for the plaintiff and against the defendant, Robert L. Berner Company in the sum of $212,000 actual damages and $212,000 punitive damages. Rulings on post-trial motions culminated in the court's granting the defendant Berner Company's motion for judg-

ment n.o.v.[1] and entering judgment for the defendant. Plaintiff Continental appealed.

The main contested issue presented by plaintiff's appeal is whether the plaintiff made such proof of special damages as is required under Illinois law to sustain a verdict for actual damages and punitive damages in a libel *per quod* action.

In our opinion in the previous appeal (345 F. 2d 395, 397) we declined to follow the rigid rule of *Erick Bowman Remedy Co., Inc.* v. *Jensen Salsbery Laboratories, Inc.*, 8 Cir., 17 F. 2d 255, that generally a complaint seeking special damages in a libel *per quod* case should specifically allege by name the customers claimed to have been lost. We observed that *Erick Bowman* antedated the liberalized pleading requirements of the Federal Rules of Civil Procedure. We found that the plaintiff's allegations of the specific figures of its gross sales before and after the publication coupled with the averment that the decrease was the natural and proximate result of the letter involved were sufficient from the pleading standpoint to state a claim in libel *per quod*. But we were not there concerned with the nature or quantum of the proof requisite to recovery upon such a claim. We recognized only that "notice" pleading dispensed with any requirement that the complaint set forth with particularity the name of each customer allegedly lost.

The record discloses that plaintiff is a California corporation which buys various kinds of nuts, processes them, and then resells them. It sells both shelled and unshelled nuts. The defendant is an Illinois corporation engaged in a similar business but it sells only unshelled nuts. Both of the corporations had been in the nut business for about 25 years, and each operated this business through brokers. The plaintiff had 66 brokers selling to its customers, and the defendant 64 brokers. Each sells unshelled Brazil nuts.

[1] The court also conditionally granted the defendant's motion for a new trial, pursuant to Rule 50(c) of the Federal Rules of Civil Procedure.

The Brazil nuts imported by the plaintiff are of the type known as "natural" nuts. They are cured, dried, and processed after importation and before offered for resale by the plaintiff. The Brazil nuts sold by the defendant are dried, cured, and processed before being imported.

At the beginning of the 1961 season for the domestic sale of Brazil nuts the defendant sent a letter under date of September 25, 1961, to its 64 exclusive brokers. In this letter the "natural" Brazil nuts, such as those imported by the plaintiff, were referred to as "green" nuts. It was claimed that such nuts were "rarely, if ever, properly cured" and it was stated that 45% of all of the Brazils imported for the season were "green" but that defendant had imported only dried nuts. Moreover, the letter claimed that because of a moisture in the nuts, "[T]he people who buy Green Brazil Nuts (and most of them won't know they are getting green nuts) will have a shrinkage on their hands and the nuts will develop mould". The letter warned that "Food and Drug will be more active than ever" and that "somebody is going to be in trouble" if the Food and Drug inspectors find that the green Brazil nuts do not meet the proper standards. At the end of the letter the defendant listed plaintiff Continental Nut Company as one of the four importers bringing most of the green Brazil nuts into the country.

Circulation of this letter solely to defendant's brokers could not injure the plaintiff, since defendant and the plantiff make their sales to customers through different brokers. However, there is testimony by four of the plaintiff's brokers that some seven or eight of their customers saw the letter and that three of these identified customers did not buy from plaintiff in 1961 or 1962. And, plaintiff's president testified that of the 384 customers, plaintiff had in 1960, 92 did not buy from it in 1961, and an additional 51 did not buy from it in 1962. None of these previous customers were called as witnesses nor was any evidence adduced as to the buying requirements of the three customers who saw the letter and placed no order with plaintiff in 1961 or 1962, nor with respect to the estimated profit plaintiff would have realized from purchases of these cus-

tomers had their patronage remained with the plaintiff. Thus, the record is barren with respect to evidence of the sales and profit figures concerning the three customers shown to have seen the letter. Likewise, there is no evidence with respect to sales and profit figures relating to the other 140 previous customers, who did not reorder from the plaintiff in 1961 or 1962, although the evidence discloses that the plaintiff did maintain an account card for each of its customers, showing name and address and each purchase made by the customer. Moreover, plaintiff's president testified that of the previous customers who failed to buy from the plaintiff in 1961 and 1962 he did not know as a fact what customers the plaintiff lost as a result of the defendant's letter nor did he know whether the plaintiff lost any prospective customers.

The evidence as to monetary damages relied upon by the plaintiff to support and sustain the verdict consists of certified audit reports showing a decline in plaintiff's net sales, gross profits, net profits, earned surplus, and sales of Brazil nuts and of mixed nuts following the circulation of the letter to defendant's brokers as compared with increases in equivalent figures for the defendant (although only 40% of the defendant's business was in nuts—it also handled fruits and vegetables); and of testimony of a certified public accountant relative to a projected loss of profits by the plaintiff on sales of Brazil nuts and of mixed nuts during the two year period (the 1961 and 1962 seasons) following circulation of the letter.

Although the certified audit report figures might have been of some corroborative value in another context they are not meaningful here. They do not serve to establish loss of profit due to loss of sales of Brazil nuts, much less that any such loss was the result of patronage withheld because of the letter.

In making his projection of loss of profits the accountant witness assumed that plaintiff would have sold all of the Brazil nuts it purchased for the 1961 season during that season, subtracted the amount actually sold, and on the basis of "unrealized sales" applied an average sales price and profit margin which indicated a loss in net profits of

$254,064 for the 1961 season, the year ended June 30, 1962. A figure of $179,261 loss of net profits for the succeeding year was similarly arrived at on the basis of averaging the actual sales for the years ended June 30, 1960, and June 30, 1961, and the sales attributed as above to the year ended June 30, 1962. A critical error involved in this computation is the unwarranted assumption, unsupported by any evidence, that plaintiff would have sold during the 1961 season all of the Brazil nuts it had purchased for that season although its purchase for that year substantially exceeded its sales in the previous years. And, in terms of sales, the projected figure for plaintiff's sales of Brazil nuts for 1961 was placed at $780,000 as compared to actual sales of $530,000 in 1960. Plaintiff thus attempts to show a decline in 1961 from an assumed sales figure for that year which is almost 50% higher than the actual sales figure of the year before. By so doing, the plaintiff arrives at a profit figure on sales of Brazil nuts for 1961 which is more than twice that of the year before.

Apart from the inherent defects in the damages evidence here adduced, and its insufficiency to establish what actual monetary damage may have been sustained by the plaintiff, it is readily apparent that all of this evidence reflects a most general approach a — potpourri concept of dollar amounts of damages attributing all decline or loss in either the plaintiff's business generally, or in its sales of Brazil nuts, to the defendant's letter.

Our attention has been directed to no Illinois case involving appellate review of a fully tried attempt to prove special damages in a libel *per quod* action. Nor are we aware of any. The Illinois cases, and the decisions of this Court,[2]

[2] Among the many cases referred to in this connection are: *Campbell* v. *Morris*, 224 Ill. App. 569; *Davis* v. *Ferguson*, 246 Ill. App. 318; *Life Printing and Publishing Co.* v. *Field*, 324 Ill. App. 254 58 N.E. 2d 307; *Cook* v. *East Shore Newspapers, Inc.*, 327 Ill. App. 559, 64 N.E. 2d 751; *Dilling* v. *Illinois Publishing & Printing Co.*, 340 Ill. App. 303, 91 N.E. 2d 635; *Parmelee* v. *Hearst Publishing Co.*, 341 Ill. App. 339, 93 N.E. 2d 512; *Eick* v. *Perk Dog Food Co.*, 347 Ill. App. 293, 106 N.E. 2d 742; *Tiernan* v. *East Shore Newspapers, Inc.*, 1 Ill. App. 2d 150, 116 N.E. 2d 896; *Gogerty* v. *Covins*, 5 Ill. App. 2d 74, 124 N.E. 2d 602; *Hambric* v. *Field Enter-*

concerning libel *per quod* have turned on the question of the sufficiency of the allegations to state such a claim rather than on the sufficiency of the proof to support a recovery. But none of these cases reflect any inclination to dispense with the requirement that "special damages" be proved with specificity. And, they do recognize that in libel *per quod* action the special damage must be shown to be a necessary and proximate consequence of the publication involved. *Davis* v. *Ferguson,* 246 Ill. App. 318, 333.

We agree with the District Court that on the evidence here adduced the jury "was left to speculate as to the dollar amount of these accounts and whether the libel caused the losses". And we are convinced that under the theory of the Illinois *per quod* decisions that in a libel *per quod* action based on loss of customers, where, such as in the case here, the plaintiff knows the identity of the customers it claims to have lost and has a record of the previous purchases of each, special damages in the form of profits lost because of the withdrawal of patronage by such customers, to be recoverable, must be proved with that specificity which shows the loss of profit attributable to patronage withheld by the particular customer and that such withholding was the result of the publication. This the plaintiff failed to do. And, such is the nature of "special damages". They are such as really took place. They are not to be implied but are to be specifically proved.

As the trial judge so aptly pointed out, the striking fact about the record in this case is that plaintiff has not produced the testimony of a single customer or former customer on these questions. Nor has it shown the dollar value of lost sales to specific customers. And there is no evidence that more than seven or eight of these customers even knew of the publication referring to plaintiff as an importer of "green" Brazil nuts. No customer, although all were known

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prises, 46 Ill. App. 2d 355, 196 N.E. 2d 489; *Lundstrom* v. *Winnebago Newspapers,* 58 Ill. App. 2d 33, 206 N.E. 2d 525; *Whitby* v. *Associates Discount Corp.,* 59 Ill. App. 2d 337, 207 N.E. 2d 482; *Segall* v. *Lindsay-Schaub Newspapers, Inc.,* 68 Ill. App. 2d 209, 215 N.E. 295; *Brewer* v. *Hearst Publishing Co.,* 185 F.2d 846; and *Schy* v. *Hearst Publishing Co.,* 205 F.2d 750.

to plaintiff, was asked the questions; the jury was left to speculate.

Plaintiff argues that for it to have interrogated its previous customers on the subject would have resulted only in aggravating the damage by alienating such customers. We do not find such argument to be persuasive. *Electric Furnace Corp.* v. *Deering Milliken Research Corp.*, 6 Cir., 383 F. 2d 352, 354-355.

Plaintiff's reliance upon *Pendleton* v. *Time, Inc.*, 339 Ill. App. 188, 89 N.E. 2d 435, is misplaced. There the court pointed out (339 Ill. App. 188, 196, 89 N.E. 2d 435) that the action involved was not to be confounded with a libel action where unless the words are actionable *per se*, special damages must be alleged. The court found an allegation of special damage unnecessary. The case is no authority concerning what constitutes proper proof of special damage. Likewise, *Erick Bowman Remedy Co., Inc.* v. *Jensen Salsbery Laboratories, Inc.*, 17 F. 2d 255, is of no aid to plaintiff. There the court merely recognized (17 F. 2d 255, 261) that there can be circumstances, where, in a libel *per quod* action, an allegation of the names of customers who withdrew or withheld their custom is unnecessary—such as a case where the customers are a floating or transitory class, and their individual identity unknown. But that is not the situation here.

We are of the opinion that the rationale of *Electric Furnace Corp.* v. *Deering Milliken Research Corp.*, 6 Cir., 383 F. 2d 352 is controlling here. That decision strongly reaffirms the principle that evidence of a decline in sales and profits after the publication is not enough to support a verdict because it fails to show causal connection between the publication and the loss. The court observed that plaintiff's reliance on a general decline in its business meant that "the *sine qua non* of a libel per quod action—proof of actual and special damages as a result of an alleged libel—is missing. There is, in effect, no tort demonstrated". (383 F. 2d 352, 356).

And, absent proof of actual damages, an award of punitive damages in an action for libel *per quod* is without support. *Electric Furnace Corp.* v. *Deering Milliken Research Corp.*, 6 Cir., 325 F. 2d 761, 766.

We conclude that the District Court did not err in granting the defendant's motion for judgment n.o.v., and entering judgment for the defendant.

The judgment order of the District Court is affirmed.

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT.
• • (Caption—62-C-422) • •

MEMORANDUM OPINION.

This is a case of libel *per quod* in which the jury awarded $212,000 in compensatory damages and $212,000 in punitive damages.[1] Defendant Robert L. Berner Co. ("Berner") moves for judgment notwithstanding the verdict or, in the alternative, for a new trial. Extensive briefs have been filed by both parties. I have examined the motion and briefs with care, and I have undertaken an exhaustive and

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[1] The background of this case is as follows:

"Plaintiff is a California corporation which buys various kinds of nuts, processes them, and then resells them. Among the products which it handles are Brazil nuts of a type known as 'natural' nuts. Plaintiff claims that it cures, dries and processes these nuts before offering them for resale.

"Defendant Robert L. Berner Company, an Illinois corporation, is engaged in a similar business. The Brazil nuts which it imports are not of the 'natural' variety but are cured and processed before being imported.

• • • • •

"The publication which plaintiff has alleged to be libelous was published and distributed by the Berner Company. The letter went out to its customers under the notation 'Important.' In the course of the letter, the 'natural' nuts bought and resold by plaintiff were referred to as 'green' nuts. The Berner Company claimed that such nuts were 'rarely, if ever properly cured.' Moreover, it claimed that because of a moisture in the nuts, '[T]he people who buy Green Brazil Nuts (and most of them won't know they are getting green nuts) will have a shrinkage on their hands and the nuts will develop mould.' Berner's customers were further warned that 'Food and Drug will be more active than ever' and that 'somebody is going to be in trouble' if the Food and Drug inspectors find that the green Brazil nuts do not meet proper standards. At the end of the letter the Berner Company listed plaintiff Continental Nut Company among those importers bringing most of the green Brazil nuts into this country." *Continental Nut Co.* v. *Robert L. Berner Co.*, 345 F.2d 395, 396-97 (7th Cir. 1965), (Opinion of the Court of Appeals reversing my dismissal of the libel *per quod* count of the amended complaint.)

time-consuming review of the transcript and exhibits in this case. I conclude that the motion for judgment n.o.v. must be denied and the motion for a new trial must be granted.

This case raises the question of what constitutes sufficient proof of special damages in a suit for libel *per quod*. More specifically, can plaintiff recover for loss of business on proof of a decline in total sales alone, when more specific and reliable evidence of special damages is available?

The amended complaint contained counts for both libel *per se* and libel *per quod*. I dismissed the former because of the content of the libel, and the latter because the allegation of special damages was not, in my view, sufficiently explicit. Plaintiff had pleaded a general decline of sales rather than the loss of specific customers.[2] The Court of Appeals, relying on liberalized rules of pleading under F. R. C. P. 8, reversed dismissal of the count for libel *per quod*, finding the allegations sufficient to require a trial. *Continental Nut Co.* v. *Robert L. Berner Co.*, 345 F. 2d 395 (7th Cir. 1965). Dismissal of the count for libel *per se* was affirmed.

Nothing in the Court of Appeals' opinion suggests a departure from the long-established rule that there can be no recovery for libel *per quod* without *proof* of special damages.[3] That opinion, like most published opinions in this area of the law, dealt exclusively with the requirements of *pleading*. It departed from the obsolete *pleading* rule announced years ago in *Erick Bowman Remedy Co.* v. *Jensen Salsbery Laboratories*, 17 F. 2d 255 (8th Cir. 1926), another *pleading* case. The Court of Appeals did not rule

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[2] "The amended complaint alleged an immediate decrease in plaintiff's gross sales of Brazil nuts and of all other nuts following the publication of the letter. Although not naming the particular customers it lost, plaintiff listed specific figures of its gross sales before and after the publication and averred that the decrease in sales was the 'natural and proximate result' of the letter." 345 F. 2d at 397.

[3] See *Electric Furnace Corp.* v. *Deering Miliken Research Corp.*, 325 F. 2d 761, 764-65 (6th Cir. 1963), and cases cited there.

on the quite distinct question of what constitutes sufficient proof, nor did it venture an opinion on it.[4]

Where, as here, a corporation is allegedly libeled, the allowable damages are pecuniary damages, ordinarily loss of business (or "custom" as the cases sometimes say). Since they are special damages, rather than general damages, they must be proved with specificity. Where the damage is loss of customers, the best proof is the testimony of customers who ceased doing business with plaintiff after the libel was published.[5] They can best testify to the amount of business they did with plaintiff both before and after the libel, and they can directly testify to the reasons for taking their business elsewhere. As to the amount of lost business, plaintiff could, in the alternative, produce detailed sales records which show how much business specific customers failed to produce after the libel.

The striking fact about the record in this case is that plaintiff has not produced the testimony of a single customer or former customer on these questions. Nor has plaintiff shown the dollar value of lost sales of specific customers. Plaintiff's proof of special damages is evidence of a decline of gross sales after the libel, and the testimony of some of its own brokers[6] that certain former customers

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[4] "[A]n allegation of special damages is sufficient when it notifies the defendant of the nature of the claimed damages even though it does not delineate them with 'as great precision as might be possible or desirable.' *Schoen* v. *Washington Post*, 246 F. 2d 670 (D. C. Cir. 1957)." 345 F. 2d at 397. The complaint under these modern rules performs the limited function of giving notice. Deficiencies in specificity are correctible through use of the generous discovery procedures provided in F. R. C. P. 27-37. Consequently the sufficiency of a complaint for *its* purpose need not govern the sufficiency of proof.

[5] See *Storey* v. *Challands*, 8 C. & P. 234, 173 Eng. Rep. 475 (1837). See also cases cited in n. 7 *infra*.

[6] Food wholesalers and retailers normally buy nuts through brokers who represent nut importers and processors. Brokers contact potential customers in behalf of their principals, promote the nuts and take orders. A single broker normally develops and maintains contacts with numerous wholesalers and retailers who might be interested in buying nuts from companies such as plaintiff and Berner.

placed no further orders. The record is practically barren of evidence of the amount of business lost when each known customer failed to place further orders. There is hardly any evidence that these customers even knew of the libel. No customer was asked the questions; the jury was left to speculate.

The puzzle in this case arises from the fact that the evidence introduced by plaintiff would probably be sufficient to support a verdict in some cases of libel *per quod*. A well-established exception to the rule of strict proof of special damages protects the plaintiff who does not know who his customers are. What is the engineer and boilermaker to do when unknown and unnamed occasional and potential customers turn away after publication of the libel? *Ratcliffe* v. *Evans*, 2 Q. B. 524 (1892). Where can the libeled auctioneer turn when the anonymous bidders come no more to his place of business after the libel is published? *Hargrave* v. *LeBreton*, 4 Burr. 2423, 98 Eng. Rep. 269 (1769). What relief has the libeled lawyer when unknown potential customers he was to receive on referrals fail to fill up his waiting room? *Ellsworth* v. *Martindale-Hubbell*, 68 N. D. 425, 280 N. W. 879 (1938). "How is a public-house keeper whose only customers are persons passing by, to show a damage resulting from the slander unless he is allowed to give general evidence of a loss of custom?" *Evans* v. *Harries*, 1 H. & N. 251, 254, 156 Eng. Rep. 1197, 1198 (Ex. 1856). And see, *Roche* v. *Meyler*, 2 Ir. 35 (1895). Whenever the libeled plaintiff's lost customers are unknown and unknowable, the law is faced with a bitter dilemma: Deny relief or relax the rule of proof.

Strict proof reduces error in a libel *per quod* suit; defendants are protected against speculative verdicts. On the other hand, the tort provides compensation for and a deterrent to the destructive conduct of the publishing of the libel. When the character of plaintiff's business produces a tension between these policies, courts have relaxed the rule of proof rather than deny plaintiff recovery. The other result would leave plaintiffs in certain businesses without relief. Shopkeepers, renderers of occasional serv-

ices, auctioneers and others who do not cater to a limited number of known customers, would suffer the harm of libel without recourse. One cost of doing certain kinds of business would be libel without remedy. The choice has been made between competing policies by permitting relief in these cases on lesser proof. See *Ratcliffe, supra; Hargrave, supra; Ellsworth, supra;* and *Evans, supra.*[7]

This case not not fit within the exception. Plaintiff had a card list of all of its customers, including their names and addresses. This is undisputed. There were 384 customers on the 1960 Brazil nut list; 92 of these were lost in 1961 and 51 more were lost in 1962. No substantial evidence was introduced to show the dollar value of the lost business of these customers. No customer was asked whether he saw the libel or, if he saw it, whether he was influenced by it. All—or at least some—customers could have been called to testify; no meaningful barrier to acquisition of this plainly relevant testimony exists or existed. This is not a case of unknown and unknowable customers; rather it is a case of failure to ask very simple questions of customers whose names and addresses appear on a list which plaintiff kept. Where specific, reliable evidence of the amount of lost business is readily available, as it is here, there is no reason to relax the rule of strict proof. Plaintiff cannot take advantage of an exception designed to protect the businessman who does not, and cannot know, who his customers are.[8]

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[7] While cases espousing a liberal pleading rule are useless on the question of proper proof, pleading cases which state a strict rule may be considered respectable authority in support of a strict proof rule since it is unlikely that a plaintiff would be required to plead more than he would be required to prove. See *e.g., Landstrom* v. *Thorpe,* 189 F. 2d 46, 55-56 (8th Cir. 1951); *Fowler* v. *Curtis Publishing Co.,* 182 F. 2d 377, 379 (D. C. Cir. 1950); *Erick Bowman Remedy Co.* v. *Jensen Salsbery Laboratories,* 17 F. 2d 255 (8th Cir. 1926); *Testing Systems Inc.* v. *Magnaflux Corp.,* 251 F. Supp. 286, 291 (E. D. Pa. 1966); *Barkhorn* v. *Adlib Associates, Inc.* 203 F. Supp. 121, 122 (D. Hawaii 1962). *Compare* the tort of "injurious falsehood," where the rule and exception are well established. See, Prosser, Torts 945-947 (3d ed. 1964).

[8] *Accord, Landstrom* v. *Thorpe,* 189 F. 2d 46, 55-56 (8th Cir. 1951).

Plaintiff's excuse is that although it knew who its customers were, their addresses and whether they purchased nuts in each year, it did not know *which* of the lost customers were lost because of the libel. The use of general proof rather than specific proof is justified on the ground that plaintiff could not separate the customers it lost as a result of the libel from those it lost for other reasons. But all that this argument reveals is an assiduous effort to remain in the dark. It may be that plaintiff was ignorant of lost customers' motives; but, unlike the exceptional cases above, here there is no excuse for plaintiff staying ignorant. Plaintiff cannot cloak itself with the exception merely by avoiding readily available evidence.[9]

Having avoided its customers, plaintiff placed some of its own brokers on the stand; they gave some inconclusive testimony as to loss of a small number of customers. With a single exception, no evidence of specific dollar amounts of lost sales was given. This testimony shows at most that five of the 143 lost customers even saw the libel.[10]

Thus, the jury heard from the brokers that certain accounts were lost, but was left to speculate as to the dollar amount of these accounts and whether the libel caused the

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[9] Plaintiff's admission that some customers might have been lost for reasons other than the libel makes the failure to seek the testimony of the customers even more striking. No substantial effort was made to offer evidence on the basis of which the jury could divide losses between the libel and other causes. "From the record in this case, it is obvious that only a part of the damages sustained by appellee resulted from the publication of the two articles by appellant, and, since the evidence was wholly insufficient to show what portion of the damages was attributable to such other causes and what portion thereof resulted from the publication of the articles, the jury was without testimony from which they could estimate the damages caused by appellant." *Houston Chronicle Publishing Co.* v. *Martin*, 64 S. W. 2d 816, 819-20 (Tex. Ct. Civ. App. 1933).

[10] Two customers did testify in this trial, both defendant's witnesses. One has bought nuts from plaintiff but had not seen the libel at any time relevant to this case; the other had not heard of plaintiff until shortly before trial of this case.

losses.[11] This gap in the testimony is inexcusable given the availability of better evidence.

While the verdict is unsupported as to sales lost from customers on the list maintained by plaintiff, the problem does not extend to all possible damages in this case. The amended complaint states that:

> "said publications caused many of plaintiff's customers to withdraw their custom, resulting in the above decrease in gross income, and the publications caused many potential customers to withhold their custom."

Even though failure to prove by direct testimony the damages caused by loss of former customers' business is inexcusable, the same failure with respect to unknown future customers not on the customer list is understandable. This is precisely the problem to which the exception to the strict proof rule is directed. Plaintiff could not know of unnamed merchants who had never bought its nuts and, because of the libel, chose not to.

Although the major portion of any loss suffered by plaintiff would be confined to its known customers, the jury's verdict may have contained elements of damages for both losses. To the extent that it represents damages for lost sales of known customers, the verdict is unsupported by the evidence and must be overruled. To the extent that it represents damages for lost sales of future customers, however, plaintiff may be entitled to some recovery. Since the verdict for special damages is partially unsupported, and since it is impossible to tell how much of the award is proper, I have no choice but to vacate the judgment and order a new trial.

The award of punitive damages is completely unsupported by the record. Where, as here, there is no libel *per se*, an award of punitive damages must rest on a find-

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[11] See *Electric Furnace Corp.* v. *Deering Miliken Research Corp.*, 325 F. 2d 761 (6th Cir. 1963). "The evidence fails to show that any business was lost due to any libelous phase of the letter of September 1956. The customers themselves could have cleared up this missing link in the proof." 325 F.2d at 766.

ing of actual malice. *John* v. *Tribune Co.*, 28 Ill. App. 2d 300, 316, 171 N. E. 2d 432 (1960), rev'd on other grounds 24 Ill. 2d 437, 181 N. E. 2d 105, *cert. den.* 371 U. S. 877 (1962); *Cook* v. *East Shore Newspapers, Inc.*, 327 Ill. App. 559, 588-94, 64 N. E. 2d 751 (1945). A careful review of the record reveals no basis for such a finding. Consequently, the award of punitive damages cannot stand.

For the reasons set forth in this opinion, the motion for judgment n.o.v. is denied and the motion for a new trial is granted.

Enter:

Bernard M. Decker,
United States District Judge.

Dated: March 3, 1967.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT.
• • (Caption—62-C-422) • •

ORDER.

This cause coming on for hearing on plaintiff's oral motion for supplemental order and for the court to reconsider its order of March 3, 1967, denying defendant's motion for judgment notwithstanding the verdict and granting a new trial, and the court having heard the argument of counsel and being fully apprised in the premises, and the court being of the view that there is no evidence in the record which would support a recovery in a reasonably ascertainable amount for the loss of potential customers or show that plaintiff's business was of the kind which had potential customers of whose existence it could not know.

It Is Ordered and Adjudged that:

1. The court's order of March 3, 1967, denying defendant's motion for a judgment notwithstanding the verdict is vacated.

2. The court's order of March 3, 1967, granting defendant's motion for a new trial is vacated.

3. The defendant's motion for judgment notwithstanding the verdict is granted and judgment is hereby entered for defendant dismissing the action.

4. The defendant's motion for a new trial is conditionally granted, pursuant to Federal Rule 50 (c), on the grounds that (1) the verdict, insofar as it represents a recovery by the plaintiff for the loss of existing customers, is not suported by substantial evidence; (2) the verdict, insofar as it represents a recovery for loss of customers, is not supported by evidence of the amount of profit lost by the plaintiff; and (3) the verdict, insofar as it represents a recovery of punitive damages, is not supported by evidence of actual malice.

Enter:
Bernard M. Decker,
United States District Judge.

Dated: March 31, 1967.

UNITED STATES DISTRICT COURT,
Northern District of Illinois,
Eastern Division.

Name of Presiding Judge, Honorable Bernard M. Decker.

Cause No. 62 C 422 Date Mar. 31, 1967

Title of Cause Continental Nut Co. *vs.* Robt. Berner.

Brief Statement of Motion
Pretrial oral mo. for suppl. order.

Reserve space below for notations by minute clerk.

Order of March 3, 1967 denying Deft's motion for judgment notwithstanding verdict is vacated. Order of March 3, 1967 granting Deft's motion for new trial is vacated.

Deft's motion for judgment notwithstanding verdict is granted and judgment hereby entered for Deft dismissing action. (Draft)

Decker, *J.*

Apr. 3, 1967.

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SEP 11 1968
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NO. 389

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

CONTINENTAL NUT COMPANY,
Petitioner,

vs.

ROBERT L. BERNER COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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No. 389

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

CONTINENTAL NUT COMPANY,
Petitioner,

vs.

ROBERT L. BERNER COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Whether in a diversity suit brought in a federal court federal law ought to dictate the elements of an action for libel.

STATEMENT OF THE CASE

Respondent sent copies of its memorandum to its 64 exclusive sales brokers (A. 183[1]). Publication to these brokers admittedly could not harm petitioner, since petitioner and respondent sold through different brokers (A. 415, 417). With one exception, none of respondent's brokers were shown to have done anything with it except put it in

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[1] References herein to A. .... are to the Appendix to Brief for Plaintiff-Appellant in the Court of Appeals.

the wastebasket (A. 214-16). The single exception, a broker in Wisconsin, reprinted the memo and sent it to wholesale nut buyers (A. 134). No loss of sales was shown to have resulted from this single publication. In fact, despite this publication, petitioner's sales in Wisconsin increased after the memo had been distributed (A. 432-33).

Petitioner did present evidence that an altered memo had been seen by four of its exclusive brokers at six customer locations. Three of these customers did not buy from petitioner in the following year (A. 256, 278, 501-02). No evidence was introduced as to the prior purchases by these customers.

Petitioner eventually claimed the loss of 92 named customers in 1961 (fiscal year 1962) as a result of the memo. The names of these customers were revealed to respondent just prior to trial, after petitioner had claimed for over a year that it could not determine which customers had been lost as a result of the memo (A. 50-51, Interrogatory 11). The petitioner thus carefully shielded the names of these customers from respondent until it was too late to interview them. Petitioner's statement of the case[2] also fails to note that its total number of customers did not decline; its total custom in fact increased in the two years following publication of the memo, only to drop in the third year (Pl. Ex. 28; A. 327-28; 999-1032; 654-661).

To supplement this showing of changes in total custom, petitioner cited changes in net operating profits, in total sales and gross profits as well as changes in respondent's total sales (Petition, pp. 7-8). The Petition, however, omits to say that:

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[2] Petition for Writ of Certiorari, pp. 3 to 9, cited herein as Petition .....

(1) While its net operating profit decreased between fiscal 1961 and 1962, petitioner's gross profit on Brazil nuts, which is the subject of the memo, increased in fiscal 1962 by some $11,000 (A. 957, 974).

(2) While its net sales and gross profits declined, the great bulk of the decline occurred in almonds and black and English walnuts (A. 957, 974), which petitioner sells primarily to candy makers after having shelled them. No such person is on the list of "lost" customers, no such person ever saw the memo, and respondent sold no shelled nuts to anyone (A. 356-60).

(3) While respondent's gross sales did increase, respondent's primary business is fruits and vegetables rather than nuts, and there was no showing that the dollar change resulted from increases in total sales of nuts (A. 176-77).

Petitioner admitted that its accounting records included a ledger card showing the name, address and the date and dollar amount of every purchase by every customer (A. 395-398; Df. Ex. 16; A. 703). The ledger cards for the 92 customers it claimed to have lost in the year the memo was published were not introduced and the total amount of their purchases in the prior year was not put into evidence (See A. 338; 700-01). There was no showing that it would have been impossible or even burdensome to calculate and introduce these dollar amounts.

ARGUMENT

There are cases which raise the question of whether state or federal law governs the sufficiency of the evidence to take a case to the jury. This is not such a case.

Petitioner chose to rest its case on evidence relating to a

decline in gross sales after publication of respondent's memorandum. The court below did not, however, consider this evidence under either an Illinois or a federal standard of quantitative sufficiency. Instead, it held that evidence of a general decline in sales is simply no evidence at all of the existence of special damage.

It did so because the Illinois courts, consistently with the common law, have made special damage the basic element of the action for libel per quod, and have defined with some care what they mean by special damage. Proof of a general decline in sales is not, under that standard, relevant to the proof of special damage. The question below was therefore not one of sufficiency, but rather whether there was any evidence of special damage as state law defined that element. As Professor Moore would put it, the question here is whether fact X "satisfies the state requirement to prove element A." 5 MOORE, FEDERAL PRACTICE ¶ 50.06, p. 2350 (2d ed. 1968). His answer is that state substantive law governs the answer to such questions.

Precision in defining the elements of the action is not unusual in the law of libel. For example, courts have always reserved to themselves the power to declare an alleged libel per se non-actionable, so as to maintain absolute control over that element of the action. In doing so, they wholly deprive the plaintiff of an opportunity to have a jury decide whether it regards the words as tending to expose the plaintiff to hatred, contempt or ridicule. The retention of this power by the court is not thought to offend the Seventh Amendment. As recently as *Rosenblatt* v. *Baer*, 383 U.S. 75, 88 (1966) this Court recognized as salutory the common law rule that the question of whether a publication is privileged is, in the first instance, for the judge alone. The question of whether the facts show a privileged occasion is far more susceptible to analysis as one of quantitative

sufficiency than is the issue of special damage. Allocating it to the judge is inconsistent with normal federal practice. Yet neither this Court in *Rosenblatt* nor any other court has suggested that the Seventh Amendment contradicts the common law rule that a judge who finds the publication privileged need not submit that issue to a jury's re-examination. The rule has not been questioned because it is part of the essential substance of the law of libel, and raises no Seventh Amendment problem. The power of a state to define the elements of a cause of action, which is the question in this case, is even more clearly a part of the substantive rights of the parties, and cannot be abrogated, as petitioner would do, by referring to rules which govern only the mode and manner of trial.

Quantum of proof was, as a result, not the issue in the court below, and the only question actually argued to or decided by the Seventh Circuit in this case was the content of the common law of libel per quod. As we will show, neither the general Illinois rule of what comprises sufficient evidence to create a question of fact nor the quite similar federal rule was thought to apply or can be applied here. As a result, this case is hardly an appropriate vehicle for deciding which of those two rules ought to be applied by a federal court in the generality of diversity cases.

What the Petitioner Did.

The difference between the kind of issue petitioner seeks to raise and that which the case actually involves is illustrated by the procedural history of this case. The complaint was originally filed on the theory that respondent's memorandum to its brokers was libelous per se. The Court of Appeals held, in its prior decision in this case, that the memorandum was not libelous per se. 345 F.2d 395 (7th Cir. 1965). It went on to hold, however, that the memo

could be libelous per quod, and remanded for trial on that issue. Despite this holding, petitioner tried its case exactly as if the language of the memorandum had been held libelous per se. The evidence of a gross decline in custom and profits on which petitioner relied is precisely the sort of evidence traditionally introduced in cases of libel per se. McCormick, Damages, 422 (1935). In fact, Illinois courts have expressly held that such evidence is appropriate and will support a substantial verdict in a per se case. *Lion Oil Co.* v. *Sinclair Refining Co.*, 252 Ill. App. 92 (1929).

The crux of the decision below, however, was that such evidence has never been appropriate in libel per quod cases because it does not tend to prove special damage. The holding below thus was not that insufficient evidence of special damage had been introduced, but that none of the evidence tended to prove special damage. To allow such evidence to support a verdict for libel per quod would simply obliterate the distinction between libel per se and libel per quod — despite the existence of more than a dozen Illinois cases which affirm and apply the distinction as a part of the common law of Illinois.[3] It would also reverse the earlier, unappealed decision of the Court of Appeals in this case that respondent's memorandum was not libelous per se.

The Substantive Nature of Special Damage.

The Illinois cases hold that words which on their face are not actionable may become actionable if they have caused special damage. The requirement of proof of damage is thus not merely, as in the law of negligence, a measure of

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[3] *E.g. Life Printing and Publishing Co.* v. *Field*, 324 Ill. App. 254, 263, 58 N.E.2d 307, 311 (1944). The cases are listed in the opinion of the Court of Appeals, 393 F.2d 283, 286, n.2.

the plaintiff's recovery. It is, instead, the essential element of the action — the fact on which liability itself turns. Until special damage has been shown, the words are not actionable at all.

Petitioner's suggestion that a federal rule, drawn from federal law cases, supports its position that evidence of a decline in gross sales is sufficient, illustrates petitioner's misconception of the issue below. As the petitioner expressly states (Petition, p. 13), these federal cases assume that a violation of law has been shown; only the dollar amount of the injury remains to be shown. In contrast, without proof of special damage, words libelous per quod are harmless, and violate no rights. As the Sixth Circuit has put it, special damages is "the *sine qua non*" of an action for libel per quod. *Electric Furnace Corp.* v. *Deering Milliken Research Corp.*, 383 F.2d 352, 356 (1967), *cert. denied*, 390 U.S. 949 (1968). It was precisely for this reason that the Sixth Circuit in the *Electric Furnace* case refused to sustain a verdict based on a libel per quod when the only proof of damages was a showing of a general decline in sales. See also *Landstrom* v. *Thorpe*, 189 F.2d 46 (8th Cir.), *cert. denied*, 342 U.S. 819 (1951).

Moreover, application of the Illinois requirement of special injury cannot be thought to offend the Seventh Amendment when exactly the same requirement was imposed in federal courts before *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). *Erick Bowman* v. *Jensen Salsbery Laboratories, Inc.*, 17 F.2d 255, 259-261 (8th Cir. 1926), for example, holds that the common law of libel required dismissal of an action for libel per quod because the plaintiff had not shown that it was specially damaged. The case was decided on the pleadings, but the Eighth Circuit's opinion makes it perfectly clear that the decision is based on the

substantive law of libel per quod, rather than on any peculiarity of pleading rules. It is thus clear that the court would have reached exactly the same result if the case had reached it only after a trial.

The *Erick Bowman* opinion is relevant here in a second way. In addition to establishing that the special damage rule, rather than any rule relating to quantitative sufficiency, would apply even if federal law governed this cause, the opinion makes clear that federal law would have rejected evidence of a decline in sales as proof of special damage. *Erick Bowman* holds that a plaintiff who has a wholly transitory class of customers and, as a result, cannot show that he lost customers or who those customers were, is the beneficiary of a special variation of the rule of special damage. Such a plaintiff can recover for a libel per quod if he establishes (1) a decline in sales and profits from an established level, (2) facts showing that the decline was the natural and probable result of the publication, and (3) that he could not allege the names of customers who withdrew or withheld their custom. 17 F.2d at 261. The Eighth Circuit in *Erick Bowman* held that the plaintiff was not entitled to the benefit of this exception to the rule of special damage.

The application of the *Erick Bowman* exception, which allows a plaintiff to rely in part on proof of a general decline in custom if it can also establish that it did not know the names of its customers, to this case was a major issue in the courts below.[4] For this Court to now hold that evi-

[4] The argument below turned in part on whether *Erick Bowman* represented the law of Illinois, and how it might affect this cause. Neither party urged at any point that a federal rule of quantitative substantiality instead governed the case.

dence of a general decline is enough to turn words not libelous on their face into actionable words would thus broaden the *Erick Bowman* exception into the general rule of libel per quod to be applied in federal courts. *Erick Bowman* holds that federal common law forbids such a result. The Seventh Amendment, by its very terms, cannot be thought to require what the common law forbids.

The Nature of State and Federal Sufficiency Standards.

The nature of the issue which petitioner raises also shows that this case simply is not an appropriate vehicle for its decision. Petitioner phrases the issue as whether a state or federal test of sufficiency of the evidence should be applied. The difference between the state and federal rules regarding sufficiency of the evidence is the difference between courts which say that an issue must go to the jury (1) in Alabama, if there is a "scintilla of evidence" to support it;[5] (2) in the Fifth Circuit, if the proven facts give support to the inference necessary to sustain a plaintiff's case, even though they give equal support to a contrary inference;[6] (3) in Illinois, unless the evidence, viewed most favorably to the opponent, so overwhelmingly favors movant that no contrary verdict could stand;[7] (4) in Connecticut, unless all of the evidence, viewed most favorably to the party against whom the court would rule, is such that rea-

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[5] *T. R. Miller Mill Co.* v. *Ralls*, 280 Ala. 253, 192 So.2d 706 (1966).

[6] *Planters Mfg. Co.* v. *Protection Mut. Ins. Co.*, 380 F.2d 869, 874 (5th Cir.), *cert. denied*, 389 U.S. 930 (1967).

[7] *Pedrick* v. *Peoria & Eastern Railroad Co.*, 37 Ill.2d 494, 229 N.E.2d 504, (1967). The positions on this issue of each of the states is summarized in this careful exposition of the Illinois rule, which appears to be at least as liberal to plaintiffs as the "federal rule" adopted in *Planters Mfg. Co.* v. *Protection Mut. Ins. Co.*, 380 F.2d 869, 874 (5th Cir.), *cert. denied*, 389 U.S. 930 (1967).

sonable minds would reach the same conclusion.[8] The range of phrasings, except for Alabama's scintilla rule, is not broad, and any difference in result is more likely to depend more on the facts before the court than on which phrasing of the rule applies.

What is startling, of course, is that under any of these standards, if they had anything to do with this case, the result below would be wrong. Had the Seventh Circuit thought the question simply one of dollars, and applied a quantitative standard taken from any case, state or federal, it would have sent this case back for a new trial. It did not because the question before it had nothing to do with sufficiency of the evidence. It is, ultimately, in this sense that this record does not raise the question of which standard, state or federal, applies in diversity cases, and the choice between those standards cannot be made by granting review of this case.

Erie and the Rule of Special Damages.

The courts below decided that petitioner had not proven special damages as state law defined that term. Petitioner does not assail that finding. The sole basis for its Petition is that federal law and the command of the Seventh Amendment grant license to submit general evidence of loss even though state law holds it insufficient to establish an action for libel per quod. However, such a result would clearly conflict with the principles of *Erie R.R.* v. *Tompkins,* 304 U.S. 64 (1938). The Petitioner seeks to avoid this conflict with *Erie* by casting the problem as one involving only a narrow question of sufficiency of the evidence. But no state-federal choice of law problem can be decided without initially referring to the general principles of *Erie.* As a result, the initial question before this Court, if *certiorari*

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[8] *Johnson* v. *Consolidated Industries, Inc.,* 153 Conn. 522, 218 A.2d 380 (1966).

were granted, would be whether the special damages rule could, under *Erie,* be considered procedural for any purpose relevant here. The answer to that question is clearly no.

We do not, of course, mean to suggest that no evidence of dollar loss was submitted by the petitioner in the district court. Some was. As we have shown, the nature of that evidence illustrates why the result which petitioner urges, far from merely preserving any legitimate federal considerations, would effectively expunge the Illinois substantive law of libel per quod, creating a new right of action where none now exists. Such a result would flout the twin aims of the *Erie* rule: discouragement of forum shopping and the avoidance of inequitable administration of the laws. It would permit recovery in a federal forum on the basis of a state created cause of action even though that recovery is totally inconsistent with the state requirements of actionable defamation which are made "strict in the interest of protection of free expression." *Whitby* v. *Associates Discount Corp.,* 59 Ill. App. 2d 337, 207 N.E.2d 482, 485 (1965).

This Court, and the courts of appeals, have applied federal standards in diversity actions in ways which may, but not predictably so, produce a different result from that which might occur in a state court. However, those instances are restricted to the presence of overriding considerations of a competing federal policy involving the administration of the judicial power on such questions as the mode and form of trial. Such a case is *Byrd* v. *Blue Ridge Rural Cooperative, Inc.,* 356 U.S. 525 (1958).

In *Byrd* this Court held that the allocation of deciding a particular question in a federal court should be made in favor of the jury in accordance with federal practice where the contrary state allocation was not bound up with the definition of the substantive rights and obligations of the parties. The core of the decision was that the state rule was

not an integral part of the right created by state statute, that the state rule would require the disruption of the relationship between judge and jury in a federal court, and that there was no predictable certainty or strong possibility that the outcome of the litigation might be substantially affected by whether the question was decided by a judge or jury. 356 U.S. at 535-40. Compare *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945); *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198 (1956).

But this Court also made clear in *Byrd* that if the state allocation of judge-jury functions were an integral part of and bound up with the definition of the rights and obligations of the parties under state law, a different result might prevail. *Cf. Dice* v. *Akron, C & Y. R. Co.*, 342 U.S. 359 (1952).

More importantly, regardless of how one interprets the principles of *Byrd*, the federal courts and this Court have never applied federal standards so as to create a whole new cause of action—or as would be true here—to totally obliterate a substantive branch of the state's common law. Under Illinois law, special damages is, as we have demonstrated, substantive in every traditional sense. It is the heart of the action and the type of issue which *Erie* commands be determined according to state law, similar to the issue in *Erie* itself of whether the railroad owed a duty of care to Tompkins as a trespasser or licensee.

No amount of invocation of *Byrd*, the Seventh Amendment or the requirements of federal law can turn that issue into something which it is not. This Court's opinion in *Byrd* itself makes that clear, for it notes that the *Byrd* rationale was not contrary to the Court's earlier decision in *Stoner* v. *New York Life Insurance Co.*, 311 U.S. 464 (1940) which held that the federal court should follow the

state rule defining evidence of whether the state-created right was established. 356 U.S. at 540, n. 15.

The very type of general loss evidence which petitioner introduced below, and which it claims now should be held to establish a cause of action under state law which denies that result, clearly shows how much in conflict such a holding would be with *Erie* and its progeny. For there is no question that if petitioner's view prevails, the type of evidence it introduced would have entitled it to a verdict in the district court. Any publication capable of being held libelous per quod under Illinois law would similarly provide a verdict on the basis of evidence which the state permits only in libel per se cases and deems not probative in libel per quod cases. Not only could such a result substantially affect the outcome of litigation in a federal court, it would with certainty do so in all cases, having nothing whatsoever to do with judge-jury allocations or other countervailing federal principles found essential in *Byrd*. That result is surely prohibited by *Erie*. It would be prohibted even if the state law involved a disruption of the judge-jury allocation in a federal court. Under the guise of housekeeping matters cast in the shibboleth of the Seventh Amendment, petitioner would accord to a federal court in a diversity case the power to define and to ignore the substantive rights and obligations of the parties which the Rules of Decision Act denies. To do so here would require this Court to overrule every *Erie* case decided in the last 30 years, including *Byrd*. See for example, *Palmer* v. *Hoffman*, 318 U.S. 109 (1943); *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945); *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

Ultimately, petitioner's attack (Petition, pp. 15-16) is directed not to the issue of whose law should apply, but

to the difficulty of meeting the burden which the common law imposes. Admittedly, Illinois does not embrace a very generous law of libel. Libel per se has been restricted, as a matter of the state's policy regarding free expression, more closely than is true in any other state. *John* v. *Tribune Co.*, 24 Ill.2d 437, 181 N.E.2d 105, 108, *cert. denied*, 371 U.S. 877 (1962). The state's recognition of libel per quod has not exceeded the narrowest of the common law rules. Petitioner does not like these Illinois restrictions on the law of libel. But it is not entitled to change them merely because it is of diverse citizenship.

Moreover, while the burden is difficult, it is not insurmountable because the federal common law imposed exactly the same standard, and it might have been met if petitioner had not chosen to hide the names of the customers it claimed to have lost until immediately before trial, had calculated the amount of their prior purchases and had introduced enough evidence of circulation to show that those customers had seen the memo. As the District Court concluded, these failures showed "an assiduous effort to remain in the dark" (Petition, p. 31) rather than an impossible burden of proof.

Rather than introduce this evidence, on which an inference of special damage might have been based, petitioner chose to introduce what the Court of Appeals called a "potpourri concept of dollar amounts of damages" (Petition, p. 22), all presumably far larger in amount than the sales which could have been affected by the respondent's memo.

This record thus discloses no more than a deliberate effort to avoid proof of special damage and to substitute proof of a very different sort in an effort to recover far more than could be recovered in an action for libel per quod. The question is not one of impossibility or unfair-

ness; it is one of the power of a state to determine its common law, and it cannot be decided by suggesting that the matter involves only a question of housekeeping rules in federal courts.

CONCLUSION

The Petition discloses no basis for the exercise of this Court's certiorari jurisdiction. No federal question of substance involving the considerations delineated in Rule 19 is presented. What the Petition presents is, at best, a disingenuous constitutional contention on a record showing not that petitioner was denied a jury trial, but rather its total failure to establish a cause of action.

For the above reasons, respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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NO. 389

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

CONTINENTAL NUT COMPANY,
Petitioner,

vs.

ROBERT L. BERNER COMPANY,
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REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

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OCTOBER TERM, 1968

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Petitioner,

VS.

ROBERT L. BERNER COMPANY,
Respondent.

REPLY TO BRIEF OF RESPONDENT IN OPPOSITION

The question sought to be presented by our petition for writ of Certiorari was: "Whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship" (Petition, p. 2). Respondent does not deny that this question is an important one which has not been, but should be, decided by this Court. Moreover, respondent admits that the evidence found below to be inadequate to support the jury's verdict under Illinois law would have supported a verdict under federal law.* Despite this explicit concession, however, respondent repeatedly contends that the critical question in this case is not one of sufficiency of the evidence at all (Resp. Brief, pp. 4, 6, 10), but "whether there was any evidence of spe-

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* Respondent states (Brief, p. 13); "(T)here is no question that if petitioner's view prevails, the type of evidence it introduced would have entitled it to a verdict in the district court."

cial damage as state law defined that element" (*Ibid.*, p. 4). This is so, they say, because "until special damage has been shown, the words are not actionable at all" (*Ibid.*, p. 7).

The obvious purpose of this line of argument is to create the impression that the Illinois requirement of a showing of special damage in libel *per quod* cases somehow establishes an additional substantive requirement which does not exist in other kinds of lawsuits in which evidence of the nature submitted here has been held under federal standards to be sufficient as to damages to support a verdict. There is no merit in this contention. As respondents have themselves recognized, special damage is simply damage which must be specially proved (Deft. Brief, U.S. Ct. App., pp. 13-17). Some libelous statements are "so obviously and naturally hurtful to the person aggrieved that proof of their injurious character can be, and is, dispensed with." *Reed* v. *Albanese*, 78 Ill. App. 2d 53, 58, 223 N.E. 2d 419, 422 (1st Dist. 1966). On the other hand, some words are not so obviously harmful, and proof of their harm cannot be dispensed with. In such cases, where damage is not a "necessary consequence" of the offending language and where damage cannot simply be inferred without any evidence, then the defamed party must produce evidence of "special damages"—must show, in other words, that he was actually damaged by the publication. *Davis* v. *Ferguson*, 246 Ill. App. 318, 333 (3rd Dist. 1927).

In this respect, the Illinois law of libel *per quod* is no different as to damages than the federal law respecting anti-trust violations. In anti-trust cases, as in cases of libel *per quod*, the plaintiff must show that he has been injured by the defendent's improper conduct in order to recover

damages.* As the Court of Appeals for the D.C. Circuit held in *Association of Western Railways* v. *Riss & Company*, 299 F.2d 133 (1962), a case arising under the anti-trust laws (299 F.2d at 135):

> "Section 4 of the Clayton Act allows treble damages, and costs including an attorney's fee, to a person who is 'injured in his business or property by reason of anything forbidden in the anti-trust laws,' 15 U.S.C.A. 15. The *'gist of the action is* not merely the unlawful conspiracy . . . but is *damage to the individual plaintiff* resulting proximately from the acts of the defendant which constitute a violation of the law.' *Glenn Coal. Co.* v. *Dickinson Fuel Co.*, 4 Cir., 72 F.2d 885, 887. *Keogh* v. *Chicago & N.W. Ry.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183; *Hunter Douglas Corp.* v. *Lando Products, Inc.*, 9 Cir., 235 F.2d 631. The finding that the conspiracy had not damaged the plaintiff was therefore a finding that the plaintiff had not proved its claim." (emphasis supplied)

Thus, in both libel *per quod* actions and actions arising under the anti-trust laws, once evidence of damage has been introduced and a verdict rendered, the question is whether the evidence is sufficient to support the verdict; and this question must be decided under either state or federal law. Here, the district court and court of appeals decided that question on the basis of Illinois law. Yet it is uncontroverted that had the question of sufficiency of the evidence been decided under federal law, the jury's verdict should have been sustained. *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Story Parchment Co.* v.

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* The distinction between libel *per se* and libel *per quod*, relied upon by respondent (Resp. Brief, p. 13) is misplaced, for it is the libel *per se* cases that are different from the general run of tort cases in that in the libel *per se* cases, no showing of damages is required.

Paterson Parchment Paper Co., 282 U.S. 555 (1931); and see other cases cited in our Petition; pp. 13-14.

No dispute is presented by this case as to the definition of any of the substantive elements of libel *per quod* under Illinois law, including the element of "special damage," since petitioner did not seek to dispense with proof of damages by simply inferring damage from the words of the publication alone. Instead it sought to, and did, show that the bulletin in question resulted in actual damage in the form of loss of business and a drastic decline in profits.

Respondents do not now deny that petitioner submitted evidence of special damage to the district court (Resp. Brief, p. 11):

> "We do not, of course, mean to suggest that no evidence of dollar loss was submitted by the petitioner in the district court. *Some was*" (emphasis supplied).

Petitioner submitted expert testimony of the injurious character of the publication. Petitioner also showed that in the year respondent published its defamatory bulletin, petitioner's net operating profits were reduced by over $160,000 (see Petition, p. 7). In that same year, petitioner was left with unsold Brazil nuts which, if sold, would have produced net profits of $254,064 (*Ibid.*, p. 7). Petitioner also showed that the year the libel was published, it lost 92 customers, or 23.9% of its business; and that it lost 51 more customers, or 13.2%, the next year (*Ibid.*, p. 8). Other evidence comparing the net sales and gross profits of petitioner's company with that of respondent was also introduced (*Ibid.*, p. 8). It was further shown that the libelous bulletin was given widespread publication, that several of petitioner's own brokers saw copies of the bulletin in their selling territories, and that they lost customers as a consequence (*Ibid.*, p. 7). Thus, given such evidence, there can

be no question that some evidence of special damage was introduced by petitioner; the only remaining question was whether the judge correctly relied on the Illinois law of "sufficiency" in determining that such evidence was insufficient to support the jury's verdict for petitioner.

Unlike respondent, both courts below certainly saw the issue as one of sufficiency of the evidence. The district court at one point held that "the evidence introduced by plaintiff *would probably be sufficient* to support a verdict in some cases of libel *per quod*" (Petition, App. B, p. 29) (emphasis supplied). But the district court decided that Illinois law required a stricter standard of sufficiency where, as here, the petitioner had a list of its customers and their addresses. The Court of Appeals likewise believed the issue to be one of sufficiency of the evidence; and it decided that question under state law (Petition, App. A, p. 19):

> "The main contested issue presented by plaintiff's appeal is whether the plaintiff made such proof of special damages as is required *under Illinois law* to sustain a verdict for actual damages and punitive damages in a libel *per quod* action" (emphasis supplied).

The Court then criticized the damage evidence introduced by petitioner for "its insufficiency to establish what actual monetary damage may have been sustained" (*Ibid.*, p. 22). According to the Court, petitioner failed to meet the standard of sufficiency established "under the theory of the Illinois *per quod* decisions," in that it failed to show "the loss of profit attributable to patronage withheld by the particular customer and that such withholding was the result of the publication" (*Ibid.*, p. 23).

The Court of Appeals' decision in the previous appeal in this case, reported at 345 F.2d 395 (1965), makes it

clear beyond any doubt that the question below had to do with sufficiency or insufficiency of the evidence of special damage. That first appeal grew out of the district court's dismissal of our complaint, *inter alia,* for "failure to plead special damages with sufficient specificity" (345 F.2d at 397). The complaint had alleged a decline in gross sales and receipts following the publication of respondent's defamatory publication (*Ibid.,* p. 397). The Court of Appeals reversed, holding that "plaintiff sufficiently alleged specific damages" (*Ibid.,* 397).* The case thereupon was sent back to the district court, where the question was no longer whether special damages had been sufficiently alleged, but rather whether the allegations of special damages were sufficiently proved. Despite a jury verdict for petitioner, the district court held that under Illinois law the evidence was insufficient to support the verdict. The Court of Appeals affirmed, also on the basis of the Illinois standard of proof.

By contrast, under the federal standard of proof, as stated and applied in the *Bigelow* and *Story Parchment* cases, *supra,* the evidence of damage introduced by petitioner would have been sufficient to sustain the verdict favorable to petitioner. Respondent makes no effort to distinguish these cases, nor could they be distinguished on the theory urged here by respondent, for the federal law involved in those cases, no less than the state law involved here, unquestionably required a showing that damages had

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* This holding by the Court of Appeals renders untenable petitioner's present contention that "Proof of a general decline in sales is not . . . relevant to the proof of special damage." (Resp. Brief, p. 4)

actually been sustained as a result of the wrong complained of.*

Thus, the question not decided in *Dick* v. *New York Life Insurance Co.*, 359 U.S. 437 (1959), and *Mercer* v. *Theriot*, 377 U.S. 152 (1964) is squarely presented here. It is whether, the jury having found for petitioner, it was proper for the judge to grant judgment not withstanding the verdict by applying a state, rather than federal, test of sufficiency of the evidence to support the verdict. As we pointed out in our Petition (pp. 11-13), the Courts of Appeals are in conflict on this question.

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* On the question of what federal law would require, respondent relies exclusively upon *Erick Bowman* v. *Jensen Salsbery Laboratories, Inc.*, 17 F.2d 255 (8th Cir. 1926). (Resp. Brief, p. 7). That case predated *Erie RR.* v. *Tompkins*, 304 U.S. 64, (1938), and dealt with the question of what must be alleged in a complaint under the federal common law of libel, rather than the federal law as to what evidence is sufficient to show special damage. Moreover, the Court of Appeals for the Seventh Circuit, in the previous appeal in this case (345 F.2d 395, 397), specifically "declined to follow the rigid rule of *Erick Bowman* . . . that generally a complaint seeking special damages . . . should specifically allege by name the customers claimed to have been lost." (Petition, App. A., p. 19)

In the light of the Seventh Amendment's guarantee of the right of trial by jury, this conflict should now be resolved by this Court.

Respectfully submitted,

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